

HEARING DECISION

COVER SHEET

Re: **V. CLINTON SCHOOL DISTRICT**

Student:

Parents:

Parents' Counsel: Ms. Diane A. Gibson, LLC
801 W. 57th Street
Kansas City, MO 64113

Ms. Elizabeth D. Badger
Badger & Levings
P.O. Box 1787
Warsaw, MO 65355

School District Counsel: Teri B. Goldman, LLC
36 Four Seasons Center, # 136
Chesterfield, MO 63017

Panel Members: Dr. Nikki Murdick Dr. Patty Smith

Panel Chair: J. Michael Cato
P.O. Box 668
Advance, Mo. 63730

Due Process Request Received: October 17 2002.

Due Process Hearing Held: December 17, 18, 19, 2002 and January 6, 2003.

**BEFORE THE DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF;)
,)
)
 Petitioner,)
)
vs.)
)
CLINTON SCHOOL DISTRICT,)
)
 Respondent.)
)

FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER.

The hearing panel, after hearing the evidence in this matter makes the following findings of fact and conclusions of law and issues the following decision and order:

ISSUES AND PURPOSE OF THE HEARING:

The Petitioners presented the following issues to be considered by the hearing panel;

A. Counsel for Petitioner indicated in a letter dated December 1, 2002, (Ex J-106) that the following issues would be raised for the panels consideration;

1. Whether the change of placement proposed by the District violates the least restrictive environment of the IDEA.
2. Whether the current IEP fails to provide the students with an appropriate education and violates the IDEA's requirement of a free, appropriate, public education.

B. Counsel for Petitioner provided an amended statement of issues in a letter dated December 6, 2003 and indicated that the following issues would be raised for the panels consideration;

1. Whether the change of placement proposed by the District violates the least restrictive environment of the IDEA.
2. Whether the current IEP fails to provide the student with an appropriate education and violates the IDEA's requirement of a free, appropriate, public education.
3. Whether the student was denied a free, appropriate, public education prior to the implementation of the IEP currently in force.
4. Whether the Clinton School district is in violation of its responsibility under IDEA and Missouri law regarding personnel development.

At the hearing, the District objected to the "new" issues as set out in the letter dated December 6, 2003. The District objected as to the lack of clarity as to which IEP constituted the "Current IEP" and further that issues 3 and 4 above were raised subsequent to the five day disclosure. Counsel for Petitioner indicated that they "assume" that the current IEP is the April 16, 2001 IEP. The hearing panel indicated the Petitioner would not be allowed to challenge any IEP developed prior to the two-year statute of limitations period and further that the personnel development issue would be limited to the extent to which it reflects an IDEA issue.

EVIDENCE AND WITNESSES ADDUCED;

The following witnesses and documents were adduced and considered by this hearing panel;

1. Joint exhibits 1-106 were offered and accepted into evidence by the joint stipulation of the parties.
2. Petitioners' exhibits 1,2,3,9,10,11,13,14,and 20 were offered and accepted into evidence without objection.

3. Petitioners' exhibits 4,5,6,7,8,12,15 and 17 were offered and admitted into evidence over Respondent's objection.
4. Petitioners' called the following witnesses during their case in chief; Dr. Elizabeth Logan, D.O., Dr. Nancy Montgomery and.
5. Respondent called the following witnesses during their case in chief; Melissa Swaters, Chana Edwards, Kristie Kilkenny, Deborah Mitchel and Jackie Beckner Jackson.
6. Petitioner called as the only rebuttal witness.

PANEL MEMBERS

Members of the due process panel were: Michael Cato, Chairperson, Dr. Nikki Murdick and Ms. Jeffi Jessee. Due to scheduling conflicts, Ms. Jessee was replaced by Dr. Patty Smith.

TIMELINE INFORMATION

1. The request for due process was received on October 17, 2002 with the original deadline for the holding of the hearing and mailing of the decision being December 2, 2002.
2. On November 14, 2002 a request was received on behalf of the School District requesting an extension of the hearing timelines.
3. The extension was granted, without objection, and the timelines for both the hearing and decision were extended up to and including January 15, 2003.
4. By agreement of the parties, this matter was set for hearing beginning December 17, 2002.
5. The panel convened and a hearing was held in this matter on December 17, 18 and 19, 2002 at the Clinton Technical School, Clinton, Missouri.
6. By agreement of the parties, this matter was set for hearing beginning January 6, 2003.

7. The panel convened and a hearing was held in this matter on January 6, 2003. At the request of the Petitioner, the hearing was moved from the Clinton Technical School to the law offices of Cason, Edgett & Mahan, in Clinton, Missouri.
8. On January 14, 2003 a request was received on behalf of the Petitioner requesting an extension of the hearing timelines.
9. The extension was granted, without objection, and the timelines for both the hearing and decision were extended up to, and including, February 28, 2003.
10. Both parties were represented by legal counsel and had the opportunity to present evidence and cross-examine witnesses.
11. The hearing was closed at the parent's request.

FINDINGS OF FACT:

1. The Student, is a nine year old boy , who, at all times relevant to this due process proceeding, resided with his parents within the boundaries of the Clinton School District (hereinafter "School District").
2. The student was diagnosed with a "severe" hearing impairment with 85% deafness in his right ear and 100% Deafness in his left ear. (Ex J-1). He wears two hearing aids.
3. Student was born two months premature. A number of medical difficulties presented early on, including Ventricular Septal Defect. ("VDS") (EX J-1).
4. On July 2, 2002, Student was seen by Dr. Mark Gelatt, M.D., of Children's Cardiac Center, in regards to a ventricular septal defect. Dr. Gelatt found student to be "an alert, healthy-appearing boy...". Further Dr. Gelatt states that "...I was not convinced that [student] had a VSD. He certainly did not have findings suggestive of a big defect...". (Ex.J-92).

5. At the time of the hearing, Student's treating physician, Dr. Elizabeth Logan, stated that "[student] has chronic bronchitis, but that's about it. Otherwise he's pretty healthy, except for the hearing loss." (T. 28). Dr. Logan expressed some concern regarding the appropriateness of an extended bus ride for the Student such as is contemplated by the Blue Springs Placement. No medical records were presented which would indicate that Student was restricted because of health concerns.

6. The panel finds that the testimony of Dr. Logan concerning the Student's educational needs is not credible.

7. The Clinton School District is a School District organized pursuant to the Revised Statutes of the State of Missouri with an approximate enrollment of some 2000 students. At the time of the hearing, only two students in the district had a diagnosis of "hearing impaired " and only one [student] was classified under the IDEA as deaf. (T. 757-758).

8. The hearing panel members in this due process proceeding are as follows:

Michael Cato	Hearing Chairperson
Dr. Nikki Murdick	Hearing Panel Member
Dr. Patty Smith	Hearing Panel Member

8. Counsel for the parents: Diane A. Gibson and Co-Counsel, Elizabeth D. Bader.
9. Counsel for the School District: Teri B. Goldman.
10. Student's family participated in the "Parents as First Teachers Program" (Ex J-1). On August 31, 1995, a communication assessment was conducted by a speech/language pathologist at the Joplin Regional Center. The test results indicated a language deficit and recommended that student attend a structured preschool setting that uses sign language. (Ex J-1).
11. In 1996, the Clinton School District received a referral from the First Steps programs regarding Student because of his hearing impairment.
12. In September 1996, the School District requested, and received, permission to evaluate Student to determine his eligibility for special education pursuant to the Individuals with Disabilities Education Act. (Ex. J-2).
13. In October 1996, the District prepared a Diagnostic Summary which reflects the results of Student's evaluation. (Ex. J-3). The Diagnostic Summary indicates that Student possesses an average IQ. Further the summary indicates that Student had limited signing skills and was experiencing a two year delay in the language skills.
14. The diagnostic team concluded that Student met the criteria to be classified as in need of early childhood special education in the areas of receptive and expressive language due to his hearing impairment. (Ex. J-3). The team made specific recommendations which include; encouraging Student to sign to indicate wants and needs, model signing, practice signing names of objects, use books and pictures to stimulate sign use, encourage Student to participate in group events.
15. On, or about, October 17, 1996, the Student's IEP team prepared an initial IEP for him to receive services in early childhood special education ("ECSE"). (Ex. J-4). Student was placed in

special education pursuant to the IEP developed. Student was in self-contained special education for 720 minutes per week..

16. The District's early childhood teacher, Lynn Hockenberry, was very fluent in sign and used sign language with all the children in the program. During his ECSE years, Student was an inquisitive learner and displayed a motivation to learn. (T. 766).

17. In May 1997 Extended School Year services were offered but refused by the parents this year and every subsequent year due to the parents' belief that the opportunities for Student to socialize in the summer in sports and play outweighed the benefits of the program offered by the District. (T.244).

18. On, or about, September 4, 1997, Student's IEP team convened to conduct the annual review of his IEP. This IEP calls for 660 minutes per week in the self-contained special education classroom and 60 minutes in the regular instructional program (Ex. J-6).

19. On, or about, May 7, 1998, the Student's IEP team again convened to prepare the IEP. This IEP called for special education 225 minutes per day for four days per week. (Ex. J-8). This IEP indicates that Student has limited signing skills and is unable to maintain eye contact when signed to. Student exhibited delays in language and it was noted that he needed instruction in sign to learn to communicate effectively.

20. In November 1998, District personnel suggested a referral of Student to the deaf education program in Sedalia, Missouri. The suggestion was rejected as the parents wanted the Student to stay in the Clinton School District. (Ex. J-7).

21. Student was referred to Missouri School for the Deaf ("MSD") for reevaluation to aid in planning his transition from ECSE to Kindergarten. On May 5, 1999, MSD provided the District with the Student's evaluation report. (Ex. J-10). In its report, MSD found that Student

communicates spontaneously through speech accompanied by gestures. The report further noted that Student was “extremely withdrawn” during MSD observations.

22. The recommendation made by MSD included; a kindergarten program with an intensive focus on language development, the use of an auditory training unit in the classroom, the use of conceptually accurate sign language, the addition of a teacher of the hearing impaired on the Student’s IEP team and consultation from a deaf education consultant. (Ex. J-10).

23. The Student’s IEP team convened on August 19, 1999 to discuss the results of the reevaluation and formulate an IEP for his kindergarten year. Based on the information received, Student received an IDEA diagnoses as hearing impaired and language disordered. (Ex. J-15).

24. The IEP formulated at the August 19, 1999 meeting , proscribed that Student would receive special education services in a modified regular education program. Student received 90 minutes of speech/language therapy per week. Assistive technology to be used included an auditory trainer in the classroom, the use of hearing aids and a daily hearing aid check. (Ex. J-16).

25. Student attended the Clinton School districts Kindergarten program. The uncontroverted testimony indicates that Student made educational progress during his Kindergarten year.

26. Student showed no disruptive or aggressive behaviors during his kindergarten year. Sometime after the Christmas break, Student began displaying “shut-down” behavior. The Student’s Kindergarten teacher testified that this time period corresponds with an increase in the academic demands being placed on Student. (T. 340). The Student would become withdrawn, put his head down, close his eyes, turn off his hearing aids and auditory trainer and “shut-down”. (T-351)

27. During the Student's Kindergarten year, he received speech-language therapy and began using some sign language. It appears that Student would, at time, appear frustrated with his inability to communicate and would resort to pointing and gestures to communicate. (T. 335).

28. During the Student's Kindergarten year, the District consulted with a deaf education specialist from MSD regarding this Student. The Student's IEP team met with the deaf educator and implemented her suggestions. (T 344). The deaf education specialist did not recommend an emphases on speech intelligibility and therefore no IEP goals were written for speech articulation. (T. 340).

29. The reports from the Student's Kindergarten year appear at J-99.

30. On, or about, May 22, 2000, the Student's IEP team met to prepare the IEP for the 2000-2001 School year. (Ex. J-19). This IEP would apply to the year student was in Mrs. Perrymann's first grade class. This IEP calls for 90 minutes per week of speech-language therapy and participation in a regular education classroom with an auditory trainer. Pragmatics and semantics are checked as areas of eligibility, but not articulation. This IEP contained goals and objectives in verbal and sign language. As in the past, Extended School Years services were offered , but declined by Student's parents.

31. In June, 2000, the Student's family considered moving to Fulton, Missouri so the Student could attend the Missouri School for the Deaf and still be near his family. This option was rejected as too expensive for the family. (T. 244). Soon thereafter, the District again initiated contacts with the deaf education programs in Sedalia and Blue Springs regarding this Student. The parents again objected to any proposed placement beyond the Clinton School District.. (T 774).

32. The School District contacted the Director of Special Education in the Blue Springs R-IV School District on September 19, 2000, to request contractual services for Student who was at the time in first grade and described as “hard of hearing.” She states “Our district is not able to provide adequate services for [student] locally.” (Ex. J-22).

33. At the hearing, Student’s mother indicated that while the Student made progress in Kindergarten, he made little progress in the First Grade during the 2000-2001 school year. Further Student’s Mother indicated her belief that the lack of progress stemmed from the teacher’s inability to address the special needs of a child with hearing impairment. (T. 269).

34. On October 17, 2000 the Student’s IEP team convened to determine the need for reevaluation. At this meeting the parents expressed concern regarding the Student’s social interactions and his lack of progress in sign language. (Ex. J-23). The Student’s class room teacher indicated her concerns regarding the Student’s “shut down” behavior. The Student’s special education teacher opined that while Student was making progress he was continuing to fall behind his peers.

35. The panel notes the testimony of the Student’s mother regarding the use of sign language in the Student’s home environment. This testimony indicates that, although trained in the use of sign language, both the Student’s mother and sibling communicate with the Student mostly by verbal communication. Further, the Student’s father declined the formal training in sign language and communicates with the Student only by verbal means. (T. 241-242).

36. The panel further notes the testimony of the Student’s mother regarding the “shut down” behavior. This testimony indicates that this type of behavior does not occur at home. (T-241).

37. On October 17, 2000, the Student’s IEP team convened to update his IEP for the 2000-2001 school year. This IEP is within the two year statute of limitations. This IEP (Ex J-24) calls

for the Student to receive resource special education instruction of 450 minutes per week and language therapy of 90 minutes per week. The IEP contains goals and objectives in signing and verbal language. Further this IEP calls for daily hearing aid checks and use of the auditory trainer. Extended School years services were again declined.

38. On October 15, 2000 the School District issued a written notice of action proposing to change the Student's educational placement to special education resource due to an increased need for one on one instruction of sign vocabulary and academics. The Student's parents provided written agreement with this change. (Ex. J-25).

39. On November 27, 2000, the Student's IEP team, agreed to increase his time in special education from 450 minutes per week to 975 minutes per week as the Student was showing difficulty in keeping pace with the regular education curriculum. (Ex. J-24).

40. On January 4, 2001, Wendy Jensen, Deaf education Consultant from the Missouri School for the Deaf observed Student in the classroom environment. (Ex J-26) The observations and recommendations of Ms. Jensen were presented to School District staff. Ms. Jensen observed that Student made use of the auditory trainer through the school day. Ms. Jansen noted that the Student did not seem to interact with his classroom peers, rarely initiated communication and did not attempt to make eye contact with individuals who were attempting to communication. Ms. Jensen notes that these behaviors are not typical in deaf and hard of hearing children.

41. Ms. Jensen suggested a new seating arrangement for the Student. She opined that Student would likely benefit from exposure to individuals who are fluent in American Sign Language. She also noted the importance of impressing upon Student that he should sign or verbally request his needs instead of gesturing or having the teachers guess.

42. On April 16, 2001, the Student's IEP team met to review and revise his IEP. (Ex. J-29). The present level of educational performance notes that Student inconsistently uses sign language and is refusing to participate in class. This IEP provides for 90 minutes per week of speech language therapy and special education instruction for 600 minutes per week. The Student was to receive one on one instruction with a paraprofessional 90 minutes per day. Although offered, Extended School Year services were declined. The proposed placement is a separate deaf education program where Student would interact with teacher/staff/peers who communicate using sign language. The District indicated this placement was necessary as Student was unable to meet the IEP goals in this district.

43. On April 18, 2001, the School District advised that Student would be referred to a comprehensive deaf education program in either Sedalia or Blue Springs. The referral was necessary in that the District was unable to meet the Student's educational needs within the regular elementary program even with special education and supplementary aids and services. This placement was not implemented as the Student's parents refused to agree to an program outside the Clinton School District. On May 8, 2001, the Sedalia School District indicated that it could not accept the District's referral. (Ex J-33).

44. The District implemented all components of the April 16, 2001 IEP with the exception of the deaf education placement. With the exception of the deaf education placement, this is the last agreed upon IEP prior to this due process hearing.

45. Petitioners objected to the proposed placement in Blue Springs on a number of grounds. The objections included the distance to be traveled, the belief that the Clinton School district could provide the Student with a proper education and lastly that the Blue Springs placement would involve peers who used only sign language. (T. 248).

46. During the 2000-2001, the District proposed that Student begin counseling. Petitioners rejected this proposal as unnecessary. (T. 356).

47. During the 2000-2001 Student made some progress, but reading and spelling continued to be difficult. At the end of the 2000-2001, Student was retained in the First grade with his parents consent. (Ex J-34).

48. During the 2001-2002, Student attended a second year of first grade in the Clinton School District pursuant to the April 16, 2001 IEP. At the hearing, Student's Mother testified that in her opinion, Student made "some" progress but that the progress was slow. School District personnel testified that Student was not making the anticipated reading gains and was experiencing increased difficulty with language development. (T.366) Further the Student's "shut-down" behaviors did not improve. (T.370).

49. On August 20, 2001, Petitioners requested an independent evaluation be conducted to help determine the type of services required by Student. (Ex J-40). The request was later clarified to indicate that Petitioners requested Student be evaluated in the areas of communication, academics, behavior and assistive technology. (Ex. J-49). Dee Harryman, Educational Audiologist, was selected to perform the evaluation. In light of the request for an independent evaluation, the Student's IEP team decided not to pursue the deaf education placement until the results of the evaluation could be considered.

50. On December 12, 2001, Ms. Harryman presented her independent evaluation report. (Ex. J-52). Ms. Harryman recommended that the Student receive intensive 1:1 speech-language therapy, using sign supported language, on a daily basis together with services from a certified teacher of the deaf and audiological services. (Ex. J-52).

51. The panel specifically notes that Ms. Harryman's reports indicate that the Student's hearing aids were not "programmed" correctly for the loop system and gave Student no benefit.

52. Ms. Harryman's report indicated three placement options: (1) Missouri School for the Deaf, (2) a contract placement with another district, and (3) additional supports to be available in the Clinton School District. The report attempts to point out the benefits and problems associated with each placement option.

53. Ms. Harryman's report also recommended that Student's family learn to sign, not only to the child, but also to each other. The report finds that this "language support is as important as the formal language being taught at school". (Ex J-52 at 215)

54. On February 6, 2002, the Student's IEP team met to review and consider the independent evaluation report. District staff found nothing in the report to indicate a placement other than a deaf education program.

55. On February 22, 2002, the Student's IEP team convened to revise his IEP. This IEP was never implemented. This IEP noted that Student's progress was below that of grade level peers, that his sign and verbal vocabulary were limited. (Ex J-60) The IEP proposed a deaf education program that included speech-language therapy, instruction from a certified teacher of the deaf, counseling from a psychologist specializing in deaf persons and a certified interpreter. Extended School Year services were offered but rejected by Petitioners.

56. On February 22, 2002, the School District issued a Notice of Action proposing to change the Student's placement to the deaf education program in Blue Springs citing Student's minimal progress in the Clinton District, his need for direct instruction from a deaf/hard of hearing teacher, his need for interaction with peers and the benefit of a counselor for the deaf. (Ex. J-64).

57. Petitioners objected to the Blue Springs deaf education program as well as the counseling.

58. Karen Block is a certified, licensed speech-language pathologist who holds a BA in Speech and Hearing Science and Psychology and a Master of Science degree in Speech Pathology. She has worked exclusively with deaf and hard of hearing students for fifteen years. (EX J-62). Ms. Block's plan called for the Student to travel to Ms. Block's home two afternoons a week to work on the IEP goals and objectives, reading and language arts.

59. On March 1, 2002, the District held a meeting to consider the plan as outlined by Ms. Block. At the conclusion of the meeting, the District staff agreed that this proposal would not meet all of the Student's needs, including counseling and the proposal was rejected. (Ex J-73).

60. On April 24, 2002 the Student's IEP team convened to discuss his three year reevaluation and placements. The IEP team agreed that further reevaluation by the Missouri School for the Deaf was necessary and Petitioner provided written consent to this plan. (Ex J-71).

61. On May 21, 2002, the Missouri School for the Deaf submitted its evaluation report regarding this Student. The report recommends that Student be "immersed consistently in a visually accessible language" and that the Student "Presents with clinically significant concerns for withdrawn behaviors in School". (Ex J-77). Further the report recommends consultation with a psychologist with experience with deaf and hard of hearing children and placement in an environment with a certified teacher of the deaf, fluent in sign language, along with peers with whom Student could directly communicate. (Ex. J-77).

62. On August 16, 2002, the Student's IEP team met to review the reevaluation and to prepare an IEP for the 2002-2003 school year. The parties agreed to continue the implementation of the April 16, 2001 except that speech/language therapy was increased to 30 minutes five times per week. Petitioners agreed to the increase in therapy. (Ex. J-89).

63. After the August 16th meeting, the District joined the Blue Springs School district's Multi-District Deaf/Hard of Hearing Program ("MDDHPP"). The parties agreed to utilize MDDHPP staff to consult regarding the Student's educational program and placement. (Ex-91).

64. In September 2002, Chana Edwards and Kristie Kilkenny, from the Blue Springs MDDHPP program observed Student in the classroom. Each had an opportunity to speak with Student's special and regular education teachers. (Ex. J-93). Their written reports contained a number of recommendations which could be implemented if Student was to remain at the Clinton School District. The District implemented all of Ms. Edward's recommendations and majority of Ms. Kilkenny's recommendations. (T. 418-421).

65. Ms. Edwards noted that Student did not appear to know how to appropriately use his hearing aids and FM system making it hard for him to follow verbal instruction. (J-93 at 345).

66. Ms. Edwards testified at hearing. Ms. Edwards has obtained a number of educational degrees and is completing her doctorate in audiology. (T. 538-539). She is licensed by the State of Missouri as an audiologist. Ms. Edwards described the Blue Springs deaf education and MDDHPP programs. She testified that MDDHPP serves approximately 46 public school districts on a contractual basis and also operates the Blue Springs deaf education program. Ms. Edwards indicates that the Blue Springs program uses a "total communication" approach which uses both sign and oral language. At the time of the hearing the Blue Springs Deaf Education program employs three certified teachers of the deaf and a paraprofessional who is fluent in sign language. The program also employs a speech-language therapist with experience in working with the deaf and hard of hearing. Additionally, the program employs state licensed interpreters and has a full time counselor position. (T 544-549).

67. Ms. Edwards testified that the student needs to attend the MDDHPP deaf education program because of the need for a certified teacher of the deaf and speech-language therapists with experience in dealing with children who are deaf and hard of hearing. Further Ms. Edwards opined that the Student needs to be in a program which has a counselor available to deal with his shut-down behavior. (T. 569). Ms. Edwards believes that the Student will not succeed academically in the Clinton School district, even with all recommendations in place. Ms. Edwards indicated that she believes that the Blue Springs program is the least restrictive environment for the Student. (T. 579). The panel finds the testimony of Ms. Edwards to be credible in all respects.

68. Ms. Kristie Kilkenny testified at the hearing on behalf of Respondents. Ms. Kilkenny has a number of educational degrees and is pursuing a doctorate in audiology. (T. 618). She is employed as an educational consultant for MDDHPP. Ms. Kilkenny indicated her opinion that the Student's shut-down behavior was not a behavioral issue, but rather resulted from his language deficits. (T. 640). She recommended immersion in an intense language environment. (T. 641). Ms. Kilkenny indicated her belief that the Student should attend the Blue Springs program, as that was the least restrictive environment. The panel finds the testimony of Ms. Kilkenny to be credible in all respects.

69. On October 4, 2002, the Student's IEP team convened to consider the reports of MDDHPP and to review and revise his IEP. (Ex. J-95). During the meeting, the Student's regular education teacher, Ms. Mitchell noted that the Student was not making adequate progress and was turning off his FM system. During the meeting the team reviewed and discussed the observation reports of Ms. Edwards and Ms. Kilkenny. Petitioners submitted a list of parental

concerns on October 10, 2002 (Ex. P-9). By the conclusion of the meeting, the team recommended that Student be placed in the Blue Springs deaf education program.

70. The IEP developed in the October 4, 2002 meeting is more extensive than any to date. This IEP calls for the Student to receive 60 minutes per week of auditory training, 90 minutes per week of language therapy, 340 minutes per week of instruction from a deaf educator, counseling for 30-90 minutes per week and audiological consultation. (Ex. J-96). Finally this IEP calls for a placement in the Blue Springs deaf education program.

71. On October 4, 2002, the District presented a notice of action changing the Student's placement to the Blue Springs program (Ex. J-97). On October 17, 2002 Petitioners initiated this IDEA due process proceeding.

72. The distance from Student's home to MDDHPP has been measured by Petitioner to be 82 miles one way. (T. 249). Student's mother testified that it took between an hour and 45 minutes to two hours due to traffic. Ms. Edwards testified that the trip took her one hour and 15 minutes "on a good day". (T. 544). The panel notes that Petitioners raise concerns regarding the distance to be traveled should the Student be placed in the Blue Springs program. Yet, the Petitioner voiced no objection to travel to the Kansas City area several times a week under the proposal submitted by Karen Block.

73. Dr. Nancy Montgomery testified at the hearing on behalf of the Petitioners. Dr. Montgomery is a speech-language pathologist who has a PH.D. in special education. Dr. Montgomery has been a part of numerous IEP teams and has participated in formulating about 50 IEPs. She reviewed volumes I and II of the joint exhibits and also the Petitioner's exhibits. Further, Dr. Montgomery evaluated Student's IEP and considered the proposed placement in the Blue Springs Program. Dr. Montgomery observed the Student for a single session, in her home, with the

Student's mother present. Dr. Montgomery did not observe the Student at school and did not interview his teachers. (T. 148).

74. Dr. Montgomery testified that, in her opinion, the School District should have prepared a behavior intervention plan to address the Student's shut-down behavior with negative consequences. (T. 71). She also testified that all the services listed in the October 2002 IEP were necessary for Student to receive a Free Appropriate Public Education. (T. 214). Further Dr. Montgomery testified that she believed that the Student could be appropriately served in the Clinton School District, although she was unaware if the district could implement all the services called for by the October 2002 IEP.

75. The panel finds that Dr. Montgomery's testimony was not credible with respect to Student's educational needs. Dr. Montgomery only met the Student a single time, for a short length of time in a home setting.

76. The Student's mother testified at the hearing. She testified that the Student had never had any problems riding the school bus in Clinton. (T. 252). She testified that she had attended each of the Student's IEP meetings. (T. 274). She testified that her primary objection to the Blue Springs program was her opinion that the Student should not have to go to school outside the Clinton School District. (T. 279). She objected to the travel due to Student's bowel and bronchial problems together with the distance involved. (T. 279). Student's mother conceded that the length of time on the bus to Blue Springs was not significantly greater than his ride in Clinton, however, she noted this ride would be different because it would be on the highway.

77. While the panel certainly empathizes with the concerns expressed by Student's Mother, it does not find her testimony regarding Student's health needs and bus ride to be credible. The

panel notes the inconsistencies between the testimony of Student's mother and that of the medical professionals who treated Student.

78. Melissa Swaters testified at the hearing on behalf of the School District. She testified that, in her opinion, the October 4, 2002 IEP offers the Student FAPE in the least restrictive environment. She stated her opinion that the Blue Springs placement is the only program where the Student can receive all the recommended service and receive FAPE. In her opinion, the benefits which the Student could gain from the Blue Springs Program far outweigh the disadvantages of the bus trip.

79. The panel finds the testimony of Ms. Swaters regarding the Student's educational needs to be credible.

80. Deborah Mitchel also testified at the hearing on behalf of the District. Ms. Mitchel is the Student's second grade teacher. She expressed concern regarding Student's reading level and believes that his difficulties stem from an insufficient language base. (T. 716). Ms. Mitchel testified that, in her opinion, the Clinton School District was not able to provide Student with the best educational opportunity. She stated her opinion that the Student needs to attend the Blue Springs program as the positives of that program outweigh the negatives. (T. 743).

81. The panel finds Ms. Mitchel's testimony credible in all respects.

82. Jackie Beckner Jackson testified at the hearing on behalf of the Respondent. Ms. Jackson is the District's Director of Special Services. She has known the Student since the age of three. She has attended each of the Student's IEP meeting with one exception. (T763). Ms. Jackson believes that counseling, rather than a behavior intervention plan, is the appropriate method to address the shut down behaviors. Ms. Jackson testified that, in her opinion, the Student requires a certified teacher of the deaf, an on-site audiologist, a speech-language pathologist with

experience in working with the hearing impaired, the presence of deaf and hard of hearing peers and a psychologist experienced in working with the hearing impaired. Further, that the Clinton School district does not have and can not provide all these components. (T. 835). Ms. Jackson supports the IEP team decision to place the child at Blue Springs. (T. 803).

83. The Panel finds the testimony of Ms. Jackson credible in all respects.

DISCUSSION

Pursuant to the Individuals with Disabilities Education Act, all children with disabilities are entitled to a free appropriate public education designed to meet their unique needs. 20 U.S.C. § 1412 (a)(1)(A). The Individualized Education Program (“IEP”) is the written instrument for each child with disabilities that includes a statement of the child’s current educational performance levels, the child’s annual goals and short-term instructional objectives, the specific educational services the child will receive and the extent the child will be in regular education programs, the date of starting and the duration of services, and both objective criteria and evaluation procedures and schedules for instructional objectives. 20 U.S.C.A. §1414(d)(A)(1998); 34 C.F.R. §300.347 (1999). The education and related services in the IEP must address all of the disabling conditions of the child. *M.S. v Board of Educ.*, 231 F.3d 96 (2d Cir. 2000) *cert. denied*, 121 S. Ct. 1403 (2001). When a Student’s behavior impedes his learning or that of others, the IEP team must consider the addition of strategies to address that behavior. 20 U.S.C. § 1414(d)(3)(B).

Under the IDEA the child must receive more than a de minimis educational benefit, but, on the other hand, the IEP need not maximize the benefit or provide every service which could be implemented. An appropriate educational program is one which is reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. of the Hendrick Hudson Central*

Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The determination of the appropriateness of an IEP must be measured from the time it was offered to the student.

In this case, the two year statute of limitations that exists for IDEA claims in Missouri precludes challenges to any IEP dated prior to October 17, 2000. Strawn v. Missouri State Bd. Of Educ. 210 F.3d 954 (8th Cir. 2000). Therefore the only IEPs to be considered are dated October 17, 2000, April 16, 2001, February 22, 2002 and October 4, 2002.

As to Petitioners claims relating to the inclusion of a behavior management plan, the panel notes that the testimony present makes clear that the Student's IEP team considered the "shut-down" behaviors and their impact on his ability to make educational progress. There is ample evidence in the record indicating that the School district tried different strategies and sought adequate advice from competent deaf educators on how to deal with this behavior.

The panel, after having reviewed the relevant law and IEPs finds that each of the IEPs at issue herein provided the Student with a free appropriate education. Each IEP substantively and procedurally complies with the IDEA's requirement. Further the panel finds that each IEP offered the Student with the opportunity to receive an educational benefit.

In assessing whether educational benefit has occurred, a child's grades, test scores and advancement from grade to grade are important factors to consider. Fort Zumwalt School District v. Clynes, 119 F.3d 607 (8th Cir. 1997). The panel notes that the Student's educational progress was certainly less than anyone involved would have hoped for. However, the Panel concludes that the lack of progress was due, at least in part, to the continued refusal of the Student's parents to allow the Student to participate in Extended School Year Services, together with the reluctance to utilize a deaf education program , even to the extent of refusing to immerse the Student in a sign language environment at home, together with a refusal of counseling

services. These items, when taken together, certainly hampered the Student's ability to make the anticipated progress. The panel finds, that the evidence points to the fact that the Student must attend the deaf education program in Blue Spring to receive FAPE. The District has continued to advocate a separate deaf education placement for this Student for a number of years. As the Petitioners have refused to allow the implementation of such a placement, they can not now be heard to complain that the Student has not made the progress they would have liked.

The Least Restrictive Environment ("LRE") requirements of the Act require that "to the maximum extent appropriate, children with disabilities. . . are educated with children who are nondisabled; and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §300.550; 20 U.S.C. 1412(a)(5).

In this case, the evidence establishes that the Student requires the comprehensive services that are only available to him at the deaf education program. The Clinton School district has made every effort to accommodate the Student's needs in his home district. The Student's impairment together with his ever increasing needs and the lack of necessary resources in the Clinton district make it paramount that the Student attend the deaf education program as quickly as possible.

The Panel notes that the Petitioners point out that the IDEA does not require the educational benefit to "maximize" Student potential or provide the best education possible. The Petitioners allege that an adequate program could be established in the Clinton School District. The Panel notes that the evidence at the hearing indicates that, even if resources were available, the Clinton School District could not reproduce the services and supports necessary for the

Student. At the hearing, the Student's Mother testified that her list of parental concerns indicated that she agreed that the Student required all the components which were available only at the Blue Springs Program.

The panel is certainly sympathetic to the length of the bus trip that the Student will necessarily endure to attend the Blue Springs program. The Panel did not find any credible evidence supporting Petitioner's position that the Student's health needs prevented him from riding the bus for the necessary length of time. This is especially true in that the Petitioners were willing to transport the Student to the Kansas City area a number of times a week under the proposal submitted by Karen Block. It is, perhaps, unfortunate that the parties were unable to reach an agreement whereby the Child could reach the Blue Springs program by means other than a lengthy, daily bus ride. It is clear however, that the benefits from the Blue Springs program far outweighed the disadvantages that might exist due to the length of the bus ride.

Pursuant to the IDEA the local education agency "shall ensure that all personnel necessary to carry out this part are appropriately and adequately prepared..." 20 U.S.C. § 1413(a)(3).

The evidence at the hearing demonstrated that Districts' staff involved in Student's education have been appropriately certified and trained for the positions for which they were employed. The District provided additional training opportunities to those staff members. District employees at times devoted their own personal time to acquiring additional knowledge, such as sign language, which would be beneficial in the education of Student. The District employed deaf education consultants who had specific training to assist and consult in the Student's Education. The District need not replicate the Blue Springs deaf education program solely to provide an appropriate educational program for the Student.

CONCLUSIONS OF LAW, DECISION AND ORDER;

After consideration of the evidence presented at the hearing, as well as the foregoing findings of fact, the panel makes the following conclusions of law, decision and order;

1. The three Member Hearing panel was validly constituted and has jurisdiction of Petitioner's claims of violation of the IDEA pursuant to 20 USC § 1415 (e) and § 162.961 RSMo.
2. The forty-five day statutory time line was validly extended upon request by on or both parties. This decision was issued by February 28, 2003, in accordance with the timeline as extended.
3. Student is appropriately defined as hearing impaired and language impaired under the IDEA and Missouri State Plan for Part B of the IDEA. The Student qualified for special education and related services under the IDEA and Missouri Statutes.
4. The Clinton School district is a legally constituted public school district within the State of Missouri and was responsible for providing the Student with a Free Appropriate Public Education in the least restrictive environment pursuant to the IDEA.
5. The IEPs developed by the Student's IEP team since October 17, 2000 provided the Student with a free appropriate public education , in the Least Restrictive Environment..
6. The proposed placement in the Blue Springs deaf education program is the least restrictive environment for the Student.
7. The School District provided credentialed teachers and para-professionals for instruction as required by law. The panel finds Petitioners allegations regarding school district personnel development are without merit.

8. The Panel orders Student to be placed at the Blue Springs deaf education program as quickly as possible and orders all parties to cooperate with this placement.
9. No issue raised by the Petitioners warrants any relief which is within the jurisdiction of this hearing panel.
10. All other requests for relief are hereby denied.

APPEAL PROCEDURES:

Any party aggrieved by the decision of this panel may, pursuant to Chapter 536 of the Missouri Statutes, appeal this decision to a state court or a federal court, within 30 days of the date of the decision.

FOR THE HEARING PANEL:

All concur.

J. Michael Cato, Hearing Chairperson
Dr. Nikki Murdick, Panel Member
Dr. Patty Smith, Panel Member

BY:

J. Michael Cato, Hearing Chairperson

Dr. Patty Smith, Panel Member

Dr. Nikki Murdick, Panel Member

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action,
TO-WIT;

Ms. Diane A. Gibson
801 W. 57th Street
Kansas City, MO 64113

Ms. Elizabeth D. Badger
Badger & Levings
P.O. Box 1787
Warsaw, MO 65355

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by first class mail, return receipt requested and by depositing same in the United States Post Office in Advance, Missouri, with sufficient postage, on this Day of , 2003.
